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SUPREME COURT

OF THE

UNITED STATES

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JAMES H. McKENNEY,
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NUMBER 8, ORIGINAL

Ex-Parte:

In the matter of

GEORGE MORAN,

Petitioner.

BRIEF OF RESPONDENT

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THE STATE CAPITAL CO., GUTHRIE, OKLAHOMA.

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This being an original petition for a writ of habeas corpus propriety perhaps will admit of a short discussion of the facts as disclosed by the petition for the writ and the return to the rule granting the writ. The crime committed in this case was committed on August 4th, 1901, at a point within the boun-

daries of Comanche County, Oklahoma Territory. This land was ceded to the Government of the United States by the Kiowa, Comanche and Apache Indians and the cession of the same was ratified by the Congress of the United States by an act approved June 6th, 1900 which act approved the agreement entered into with the above named tribes of Indians and David H. Jerome, Alfred N. Wilson and Warren G. Sayre, duly appointed commissioners on the part of the government of the United States, who did on the 6th day of October 1892, conclude an agreement with said Indians which was ratified by the act above mentioned. Volume 31, Statutes at Large of the United States, pages 678, 680 and 681. By an act approved March 3rd 1901, 31st Statutes at Large, page 1093-1094 it was provided, that the lands opened to settlement under previous acts of Congress ratifying the agreements before mentioned, that the President should make a proclamation for the opening of said lands, which act made it the duty of the Secretary of the Interior to divide the lands so ceded and opened to settlement into counties as would for the time being best subserve the interests of the public, and it was proclaimed, by a proclamation by the President of the United States as provided for in such act, which proclamation was issued July 4th, 1901, that the above described certain lands should be opened for settlement on the 6th day of August, 1901, two days after the commission of the offense charged in this case. The proclamation of the President opening the lands was issued July 4th, 1901, and agreeable to the said proclamation and the previous acts of Congress relative to said lands the Secretary of the Interior divided the lands formerly composing said Kiowa, Comanche and Apache Indian Reservation into three counties and reserved a certain defined location for a county seat in each of the three counties into which said Reservation was divided. The county of Comanche was therefore created a county and its county seat fixed by the proclamation of the President ratifying the act of the Secretary of the Interior by said proclamation on July 4th, 1901, one month prior to the commission of the of-

fense charged in this case, and the counties became proper counties of this Territory upon the issuing of said proclamation, for the Indian title to said land had been extinguished by the act approved June 6th, 1900, 31st Statutes at Large, 681; (Bates vs. Clark, 95 U. S. 204-208; Buster vs. Wright, 135 Fed. 952, 68 C. C. A., 510.) Therefore it results that the crime of murder committed on August 4th, 1901 within the Territory formerly comprising the Kiowa, Comanche and Apache Indian Reservation, was a violation of a Territorial Statute, and we submit that the judgment of the Supreme Court of the Territory of Oklahoma in the case of Moran vs. the Territory, 14th, Oklahoma, 544, 78th Pac. 111 was correct, for the reason that where the place of commission of a crime becomes a part of a new or different county or district the court of the county in which the place is situated at the time of the indictment and trial may lawfully take cognizance of and adjudicate the charge of its commission. Counsel for petitioner urge that the case of Sharp vs. the United States, decided June 12th, 1905, by the United States Circuit Court of Appeals for the Eighth Circuit is decisive of the question of the selection of the grand jury which returned the indictment in this case. With this we canot agree, for the same court on March 1st, 1906 refused to review by habeas corpus the question of the selection of grand jurors and the Circuit Court of Appeals for the Eighth Circuit made this ruling upon the application of this petitioner, in the full light of the case of Sharp vs. the United States, supra, which refusal on the part of the United States Circuit Court of Appeals for the Eighth Circuit was made nearly a year after that court decided the Sharp case, and Judge Sanborn, presiding judge of the Court of Appeals for the Eight Circuit presided at the hearing of the Sharp case and concurred in the opinion and he also wrote the opinion denying the writ in the United States Circuit Court of Appeals, March 1st, 1906, so that neither the Circuit Court of Appeals nor ourselves concede that the formation of a grand jury which returned the indictment in this case can be col-

laterally attacked on habeas corpus as is sought to be done in the case at bar.

It is urged that the facts in the return are admitted by the demurrer. It has also been decided by this court in Ex Parte Siebold, Supra that, "Mere error in judgment or proceedings under and by virtue of which a party is imprisoned constitutes no ground for the issue of the writ. Hence, upon a return to a habeas corpus that the prisoner is detained under a conviction and sentence by a court having jurisdiction of the cause the general rule is that he will be instantly remanded." The return to the writ in this case contains this verified statement: "The said W. H. Haskell admits that as warden of the state penitentiary of Kansas he has now and has had during the term of his office as such warden the said George Moran in his custody, and that the said George Moran has been and now is confined in the State penitentiary at Lansing, Kansas, as a convict, *having been duly convicted* of the crime of murder in the District Court of Comanche County, Oklahoma Territory, and pursuant to said conviction was duly sentenced by said court of Comanche County, Oklahoma Territory, to be confined in the Territorial prison for and during his natural life at hard labor."

If, as counsel for petitioner contend, all the facts set forth in the return are admitted in the demurrer the prisoner should, by reason of the fact that he was duly convicted of murder in the District Court of Comanche County, Oklahoma Territory, be immediately remanded to the custody of your respondent.

This is an original petition for a writ of habeas corpus wherein the petitioner, having been convicted of an offense the punishment for which might be capital under the laws of the Territory of Oklahoma, seeks his release. This court has no appellate jurisdiction in such a case, its power to review on appeal being limited by statute to cases less than capital.

This court can issue prerogative writs only when incident and auxiliary to a jurisdiction already otherwise acquired, because its original jurisdiction may not be enlarged. The Supreme Court is powerless to issue the prerogative writs, except as auxiliaries to the exercise of a jurisdiction already otherwise acquired. It can only issue mandamus in the exercise of original jurisdiction in a few cases "where the state, or other public minister, or ambassador, or consul or vice consul, is a party, since it is only in such cases that it has original jurisdiction at all." Virginia vs. Rives, 100 U. S. 327; Ex Parte Vallandingham 1 Wall. 252. The jurisdiction of the Supreme and District Courts is defined by statute as follows. Section 716 of the Revised Statutes of the United States reads as follows:

"Section 716. The Supreme Court and the Circuit and District Courts shall have power to issue wrts of scire facias. They shall also have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of the respective jurisdictions, and agreeable to the usages and principles of law."

Excepting in cases affecting ambassadors, other public ministers and consuls and those in which a state is a party this court can issue the writ of habeas corpus only in aid of its appellate jurisdiction. Ex Parte Siebold, 100 U. S.; Ex Parte Bollman, 4 Cranch, 75; Ex Parte Watkins, 3 Pet. 202; Ex Parte Wells 18 How. 307-328; Ableman vs. Booth 21 How. 506; Ex Parte Yerger 8 Wall 85.

The jurisdiction of this court remains, so far as we have been able to discover, almost as originally conferred by the Judiciary Act of 1779, some slight changes have been made, as for instance by the Act of January 20th, 1897, Chapter 68, Page 492, Volume 29, United States Statutes at Large, entitled "An Act to withdraw from the Supreme Court Jurisdiction of Criminal Cases not capital and confer the same on the Cir-

cuit Court of Appeals."

This court held in ex Parte, Siebold, 100 U. S., 375: "There are other limitations of the jurisdiction, however, arising from the nature and objects of the writ itself, as definned by common law, from which its name and incidents are derived. It cannot be used as a mere writ of error. Mere error in the judgment or proceedings, under and by virtue of which a party is imprisoned, constitutes no ground for the issue of the writ. Hence. upon a return to a habeas corpus, that the prisoner is detained under a conviction and sentence by a court having jurisdiction of the cause, the general rule is, that he will be instantly remanded. No inquiry will be instituted into the regularity of the proceedings, unless, perhaps, where the court has cognizance by writ of error or appeal to review the judgment. In such a case, if the error be apparent and the imprisonment unjust the appellate court may, perhaps, in its discretion, give immediate relief on habeas corpus, and thus save the party the delay and expense of a writ of error."

It was held by this court in the case of Folsom vs. United States, 161, U. S. 121, that the Circuit Court of Appeals had no jurisdiction to review the judgments of the Supreme Courts of the Territories, and it was also held in the case of New vs. Oklahoma, 195 U. S., page 252, that this court had no jurisdiction to review the judgment of the Supreme Court of Oklahoma affirming a case in which the punishment might under the laws of Oklahoma be capital. This court having therefore held that neither the United States Circuit Court of Appeals for the Eighth Circuit nor that this court had jurisdiction to review judgments of the Supreme Court of Oklahoma wherein the punishment may be capital, it follows that if the writ of habeas corpus be issued by this court it must be issued in exercise of its original jurisdiction, for this court has decided that neither the United States Circuit Court of Appeals nor this court has any appellate jurisdiction in cases such as the one at bar. The constitutinal grant of original jurisdiction of this court is contained in section 2, Article 3, of the

Constitution of the United States. The second paragraph of the section is as follows:

"In all cases affecting ambassadors, other public ministers and consuls and those in which the state shall be a party, the Supreme Court shall have original jurisdiction. In all other cases before mentioned the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as Congress may make."

Once more directing attention to Section 716 of the Revised Statutes of the United States, defining the jurisdiction of this court, and submitting and calling attention also to the case of Folsom vs. United States, 100 U. S., Supra; and New vs. Oklahoma, Supra; and this court having held distinctly in those cases that neither the United States Circuit Court of Appeals nor this Court had appellate jurisdiction to review, and certainly under the statute no original jurisdiction is given, and for these reasons we submit that this petition should be dismissed for lack of jurisdiction and your petitioner remanded to the custody of your respondent.

The opening sentence of the opinion in the case of Ex Parte Wilson, 114 U. S., at page 420, sustains all that has been said, in our judgment, with reference to the jurisdiction of this court to issue writ of habeas corpus in this case. It is as follows:

"It is well settled by a series of decisions that this court having no jurisdiction of criminal cases by writ of error or appeal cannot discharge on habeas corpus, a person imprisoned under the sentence of a Circuit or District court in a criminal case, unless the sentence exceeds the jurisdiction of that court, or there is no authority to hold him under the sentence." (And cases cited.) See also Hans Neilson Petitioner, 131 U. S., pages 184-85.

The next proposition is whether or not the alleged illegality in the manner of summoning and selecting the grand jury which returned the indictment in this case can be raised on habeas corpus. In other words, conceding for the purpose

of the argument only, that the grand jury was not regular, yet is it to such an extent jurisdictional as to render the judgment and sentence of the court void and subject it to collateral attack on habeas corpus. We contend that it is not and that the mater of the legality or illegality of the grand jury which returned the indictment goes only to the *regularity of the proceedings had, not to the jursdiction of the court.* That the jurisdiction of said court appearing both of the subject matter of the offense charged and of the person of the defendant that the judgment is not void and cannot be collaterally attacked. That the application in this case shows that an indictment fair on its face and observing all the formalities required by law was by a grand jury returned into court charging the defendant with the crime of murder. That the defendant being duly apprehended was placed upon his trial and regularly convicted and a valid sentence of the court imposed upon him. The question of determining the legality or illegality of the panel of the grand jury which returned the indictment against the petitioner was one which by law was vested in the trial court and that court having authority and jurisdiction to hear and determine the question of the regularity or irregularity of said grand jury in the exercise of that power decided that it was valid. If, in determining this mater the court reached an erroneous conclusion, certainly that did not divest the court of jurisdiction either of the person of the defendant or the subject matter of the action. At the most it could only be error which was subject to be redressed on appeal to a higher court. The case was duly appealed and the Supreme Court of the Territory of Oklahoma affirmatively added its sanction to the holding of the trial court that this was a valid grand jury so that both the trial and appellate courts of the Territory clothed with jurisdiction to hear, try and determine the question of the legality of the grand jury in question have affirmed that it was legal. Now by any process of reasoning can it be said that the decision of these courts was and is a nullity. We say

no. The petitioner does not occupy the position of a person placed on trial for an offense required under the law to be presented by an indictment where no indictment in fact is returned, or where the defendant is only informed against when the law requires an indictment. There is a clear distinction in my mind between the two classes of cases, for here there was an indictment returned by a grand jury composed of the requisite number of persons possessing the statatory qualifications of grand jurors under the laws of the Territory selected and summoned in a manner approved by both the trial and Supreme Courts of the Territory, and even if this court should be of the opinion that the method of selecting these grand jurors was irregular or unauthorized by law, yet the fact remains that they were a part of the machinery of the court acting at least under color of authority and if not a *de jure* grand jury were at least a *de facto* grand jury and their acts cannot be collaterally attacked nor the jurisdiction of the court divested on habeas corpus. There are many authorities upon this proposition and I will endeavor to cite those which I consider the most in point and of the greatest weight. In the case of Ex Parte Harding, 120 U. S., pages 782 to 784 inclusive, the doctrine is laid down, that objections that a grand jury was *improperly constituted* and that the defendant was denied compulsory process for witnesses, go only to the regularity of the proceedings, not to the jurisdiction of the court. The first paragraph of the syllabus reads in part:

"This court cannot discharge on habeas corpus a person imprisoned under the sentence of a circuit or district court in a criminal case, unless the sentence exceeds the jurisdiction of that court or there is no authority to hold the prisoner under sentence."

Also in the second and third paragraph of the syllabus as follows:

"A territorial court is not deprived of its jurisdiction to try a person indicted for a criminal offense by the fact that an

alien sat on the grand jury that found the indictment under a provision of a territorial statute permitting it.

"The denial of compulsory process to enable a person charged with crime to obtain witnesses at the trial in the court below does not invalidate the judgment."

I quote from the opinion as follows:

"This court has no jurisdiction for the discharge on habeas corpus of a person imprisoned under the sentence of a territorial court in a criminal case, unless the sentence exceeds the jurisdiction of that court or there is no authority to hold him under the sentence. Ex Parte Wilson, 114 U. S. 417 to 420, and the cases there cited. The fact that the law of the territory allowed an alien who had declared his intention to become a citizen of the United States to sit on a grand jury and that an alien did in fact sit on the grand jury that found the indictment against this petitioner, did not deprive the court of its jurisdiction for his trial under the indictment. The objection, if it be one, goes only to the regularity of the proceedings not to the jurisdiction of the court. The same is true of the allegation in the petition that the petitioner was denied his right to have compulsory process for obtaining witnesses in his favor. For such errors or irregularities, if they exist, a judgment is not void, and a writ of habeas corpus gives this court no authority for their correction."

This proposition as to whether or not a de jure grand jury is an essential to the jurisdiction of the court and whether a person convicted on an indictment returned by a grand jury unauthorized by law, but nevertheless exercising the functions of a grand jury has been squarely passed upon by the Supreme Court of Wisconsin in the cases, consolidated, of the State ex rel Dunn vs. Noyes and Elliott, Volume 87, Wisconsin Reports, pages 340 to 348. These proceedings were brought to the Supreme Court of Wisconsin by a writ of certiorari to review the proceedings in habeas corpus had before the judge of the Circuit Court of Milwaukee County, by which the defendants in error had been discharged from imprisonment and in which the Supreme Court reversed the

judgment and orders of the court below. The proposition involved in these cases was this. A grand jury had been summoned and empanelled for the September term of the municipal court of Milwaukee County and when the October term of said court came on, instead of a new grand jury being empanelled for the October term, the grand jury which had acted at the September term was continued over and used as a grand jury for the October term, which was entirely unauthorized by law and this unauthorized grand jury returned the indictments at the October term on which the defendants had been convicted. They commenced the investigation which resulted in the indictment at the September term, but not having concluded the same continued their sittings over and into the October term and until the last day thereof when the said indictments were found and duly returned. On these facts the judge of the Circuit Court discharged the defendants holding that said indictments were void and that the said municipal court had no jurisdiction therefore to issue the writs for the arrest or the commitments for the detention of the defendants. The second syllabus of the opinion of the Supreme Court in this case reads as follows:

"Where the grand jury summoned and empanelled for one term of court holds over into the next term, and at such second term is recognized by the court as a lawful grand jury it is a grand jury de facto and as against collateral proceedings (in this case writs of habeas corpus) the indictments found by it at the second term are valid, and give the court jurisdiction to issue writs of arrest and commitments."

From the opinion of the court I quote further:

"We take it for granted that the learned judge of the court below held that the municipal court had no jurisdiction to issue the writs and commitments on which the defendants were arrested and imprisoned on the ground that the indictments on which they were based were void, and that the indictments were void because not found by a lawful grand jury. The decision of the court below depended then on the

legality of the grand jury that found the indictments. That question is supposed to be before us on this certiorari. But as we understand the law the court below had no right in this collateral proceeding to inquire into the legality of that grand jury and decide it to have been an illegal body without authority to find the indictments; nor has this court the right to so inquire and decide. We are precluded from inquiring and determining whether the body of men that act as a grand jury was a grand jury *de jure* by the barrier the law sets up to protect the acts of that body in the interest of the public and public justice as a grand jury *de facto.*

The *de facto* doctrine which was introduced into the law as a mater of policy and honesty to protect the interests of the public where those interests were involved in the official acts of persons exercising the duties of an officer, has its most salutary application to the acts of a grand jury and of other official instruments of the court which constitute judicial proceedings. *The courts are supposed to select and determine the qualifications of their subordinate official instruments necessary to the administration of justice.* Their acts cannot be questioned without seriously affecting the proceedings of the court and the conclusiveness of their judgments. The grand jury in question was summoned, selected, empanelled and sworn for the September term of the court and held its session and did business during that term. There is no question but that it was a legal grand jury throughout the September term. On the last day of that term this same body adjourned with the court to the first day of the October term and continued its unfinished business. It is contended that this body became functus officio as a grand jury on and after the last day of September term. It was recognized by the court as a lawful grand jury and the court received the indictment found by it and finally discharged it from further service and ordered the payment of its fees, etc. There cannot be a more appropriate application of the de facto doctrine than to such a body as a grand jury de facto while thus holding over and doing business in the October term of the court. This doctrine in its application to public officers and other acts is well understood. Its history, object and uses are exhaustively treated in the leading case of state vs. Carroll, 38 Connecticut, 449."

In People vs. Petrea, 92 N. Y. 128, the indictment for grand larceny was found by a grand jury *drawn* under a *void statute*. In was insisted on behalf of the defendant that the grand jury was not a lawful one or within the requirements of the constitution. On behalf of the people it was contended:

"That it is sufficient to maintain the authority of the grand jury to investigate criminal charges and find indictments valid in their nature, that the body acted under the color of lawful authority."

The following cases are cited to this principle:

People vs. Dolan, 6 Hun. 232.
Dolan vs. People, 6 Hun. 493, 64 N. Y. 485.
Carpenter vs. People, 64 N. Y. 483.
Thompson vs. People, 6 Hun. 135.
People vs. Jewett, 3 Wen. 314.
Cox vs. People, 80 N. Y. 500.
Friery vs. People, 2 Keys, 450.
Ferris vs. People, 31 How. Pr. 145.

The court said:

"The objection to the constitution of the grand jury which found the indictment lies solely in the fact that they were drawn under the provisions of a void statute, etc. In all other respects the proceedings were regular. The jurors were drawn by the proper officer; they were regularly summoned and returned by the sheriff. They were recognized, empanellel and sworn as grand jurors by the court and as grand jurors they found the indictment: and moreover they were good and lawful men and duly qualified to sit as grand jurors. * * * The grand jury, although not selected in pursuance of a valid law was selected under *color* of law and *semblance* of legal authority. * * * An indictment was found by a body drawn, summoned and sworn as a grand jury before a competent court and composed of good and lawful men. The jury which found the indictment was a *de facto* jury selected and organized under the forms of law."

In People vs. Fitzpatrick, 56 How. Pr. 14 the indictment was found under a law *void* because unconstitutional. The above language in the Petrea case was approved by the two judges and the indictment was held good and valid because found by a grand jury de facto.

"The grand jurors are public officers and they are therefore within the common doctrine and their acts should be held valid as those of any other officer de facto."

In People vs. Dolan, 6 Hun. 232 it was not known how or by whom the persons summoned, sworn and acting as grand jurors were drawn. The court said:

"It is sufficient to maintain the authority of the grand jury to investigate criminal charges and find indictments valid in their nature, that the body acted *under color of lawful authority.*"

In the case of In Re Gannon, 69, Cal. 541 the grand jury organized in July, 1885 held over and was not dissolved by the court until March, 1886, notwithstanding a new grand jury had been selected and returned in January, 1886. A witness refused to testify before this old grand jury on the ground that it was not a legal grand jury. He was imprisoned for contempt and was seeking his discharge by habeas corpus. The court said:

"As an organized grand jury it would have been competent to act under color of lawful authority. Having been appointed to office and having taken the oath of office the individual members are officers of the court not only de jure but de facto, and their acts are valid so far as the public rights are concerned although the title under which they perform those acts may be questionable. *The indictment found by a de facto grand jury is as regular as one found by a de jure grand jury.*"

In the case of Ex Parte Haymond, 91 Cal. 545, a witness refused to testify before the grand jury on the ground that it was not a legal grand jury and sought to be discharged from imprisonment on habeas corpus. The court said:

"Without passing upon the question whether the grand jury before whom the petitioner was summoned to appear was empanelled in accordance with the provisions of the law relating to that subject it is sufficient for us to say that such body has certainly a de facto existance."

In Dolan vs. People, 64 N. Y., 485 and in Carpenter vs. People 64 N. Y. 483 the legality of the jury was challenged because illegally drawn by a commission under an unconstitutional statute, and the proceedings were sustained on the grounds of de facto officers.

In State vs. Belville, (Iowa) 56 N. W. 545 it is held that a grand jury composed of an improper number may find a valid indictment.

In Ex Parte Springer, 1, Utah, 114, the indictment was for a capital offense and the court said:

"The fact that the grand jury which found the indictment was illegal will not be considered upon the hearing of habeas corpus as we conceive that we should stand upon the indictment."

In Ex Rel Dunn, supra, the court further said:

"In reason and by analogy a person under indictment seeking his discharge upon habeas corpus has the same right to allege that the judge or clerk of the court is not lawfully judge or clerk as that the grand jury is not a legal grand jury. The several members of the grand jury are officers of the court as we have seen and their acts should be protected by the same principle that they are de facto jurors."

In Re Burke, 76 Wis., 367 it was alleged that there was no office of Judge to be filled by the incumbent, but it was held that the incumbent was judge de facto.

In concluding the opinion in the suit Ex Rel Dunn vs. Noyes, Supra, the Supreme Court of Wis. said:

"It would put an end to judicial proceedings if the legal title and qualifications of all judicial officers could be contested in collateral proceedings at the instance of aggrieved parties. This is a very important question and a new one in

this court. We have cited all the cases at hand and from the high character of the court they ought to be considered not only satisfactory, but sufficient, especially when based upon such cogent and conclusive reasons. We hold, therefore that the indictments found against the defendants are not void but good and valid indictments, so far as this collateral proceeding is concerned because found by a grand jury acting under color of lawful authority and a good and sufficient grand jury de facto. It follows also that the municipal court of Milwaukee had jurisdiction to issue the writs by which the defendants were arrested and the commitments upon which they were imprisoned and therefore the judge of the circuit court had no cognizance of the cases to discharge the defendants."

It seems to me that there is a complete analogy between the case of a de facto judge and a de facto grand jury. In other words the judge is part of the machinery of the court and he is either elected or appointed according to certain definite provisions of law. Likewise the grand jury may be a part of the machinery of the court and is drawn and empanelled according to definite provisions of law. If a judge who has not been legally appointed or elected, or who in fact has no legal title to the office can preside over a court, try one charged with criminal offense and impose a sentence upon him, all of which can be held valid and legal upon the grounds that he is a de facto officer performing the public duty under color of title to office, so it seems to me that there is equal force in the contention that the grand jury, even though summoned in an irregular manner yet consisting of persons possessing the statutory qualifications of grand jurors and performing their part of the functions of the court that their actions as de facto officers are equally invulnerable to collateral attack. The proposition that a de facto judge may lawfully preside in the trial of a criminal case and impose a valid sentence has been settled beyond any controversy in the late case of Ex Parte Ward, 173 U. S., 452 to 456 inclusive. The circumstances of this case were that Ward was tried and

found guilty before Edward R. Meek, Judge of the District Court of the United States for the Northern District of Texas for an offense against the laws of the United States, and was sentenced therefor to the penitentiary at Leavenworth, Kansas. He thereupon made application to the United States Supreme Court for leave to file a petition for habeas corpus on the ground that the sentence was void because Judge Meek was appointed at a time and in a manner not authorized by law. In discussing this matter the Supreme court said:

"It is further contended that the President could not during the recess of the Senate and without its concurrence, invest an appointee with any portion of the judicial power of the United States Government as defined in Article three of the Constitution because that article requires that Judges of the United States Courts hold their offices during good behavior and hence that no person can be appointed to such office for a less period and authorized to exercise any portion of the judicial power of the United States as therein defined.

"We need not, however consider the elaborate argument of counsel in this behalf, since we regard the well settled rule applicable here, that where a court has jurisdiction of an offense and of the accused and the proceedings are otherwise regular, a conviction is lawful although the judge holding the court may be only an officer de facto; and that the validity of the title of such judge to the office and his right to exercise the judicial functions cannot be determined on a writ of habeas corpus.

"In Griffin's case, Chase's Decisions, 364, 425, this was so ruled and Mr. Justice Chase said: 'This subject received the consideration of the judges of the Supreme Court at the last term with reference to this and kindred cases in this district, and I am authorized to say that they universally concur in the opinion that a person convicted by a judge de facto acting under color of office though not de jure, and detained in custody in pursuance of his sentence cannot be properly discharged upon habeas corpus.' ". Citing:

Shehans case, 122 Mass. 445.
Fowler vs. Rebee, 9 Mass. 231, 235.

People vs. Bangs, 24 Ills. 184-187.
In re Burke; In re Manning, 76 Wis. 357, 665.
In re Manning, 139 U. S. 504.
Church on Habeas Corpus Transactions, 256, 257, 259.

In concluding the opinion the Supreme Court said:

"The result of the authorities is that the title of a person acting with color of authority even if he be not a good officer in point of law, cannot be collaterally attacked, and as Judge Meek acted at least under such color we cannot enter upon any discussion of propositions involving his title to the office he held."

In the case of In re Wilson, 140 U. S. 575 to 585 the proposition as to whether or not an infirmity in the panel of the grand jury which returned the indictment gave ground for relief by habeas corpus, was fully discussed, and I extract therefrom the following:

"A deficiency in the number of grand jurors prescribed by law, there being present and acting a greater number than that requisite for the finding of an indictment is not such a defect as vitiates the entire proceedings and compels his discharge on habeas corpus, though unnoticed by the prisoner until after trial and sentence."

After discussing the question of what was required to constitute a valid jury under the Territorial laws of Arizona, the Supreme Court said:

"This presents an interesting question of statutory construction, one into which however, we deem it unnecessary to enter. As it is a question if it had been duly presented to the District Court, a court having jurisdiction over the offense and the prisoner, and by it erroneously decided, can it be that such erroneous decision would have vitiated and rendered void the sentence thereafter rendered? We think not."

Further on in the opinion the court said:

"An imprisonment under a judgment cannot be unlawful, unless that judgment be an absolute nullity; and it is

not a nullity if the court has general jurisdiction of the subject, although it should be erroneous."

In Ex Parte Siebold, 100 U. S. 275 the court said:

"Hence upon a return to a habeas corpus that the prisoner is detained under a conviction and sentence by a court having jurisdiction of the cause, the general rule is, that he will be instantly remanded. No inquiry will be instituted into the regularity of the proceedings unless perhaps where the court has cognizance by writ of eror or appeal, to review the judgment."

In Ex Parte Bigelow, 113 U. S. 330-331 the court said:

"It may be confessed that it is not always easy to determine what matters go to the jurisdiction of the court, so as to make its actions when erroneous a nullity. But the general rule is, that when the court has jurisdiction by law of the offense charged and of the party who is so charged its judgments are not nullities. * * * We are of the opinion that what was done by that court was within its jurisdiction. That the question thus raised by the prisoner was one which it was competent to decide, which it was bound to decide, and that its decision was the exercise of jurisdiction."

Ex Parte Watkins, 3 Peter, 193.
Ex Parte Parks, 93 U. S. 18-23.
Ex Parte Yarbough, 110 U. S. 651.
Ex Parte Crouch, 112 U. S. 178.

In Ex Parte Wilson, 114 U. S. 421, the court said:

"It is well settled by a series of decisions that this court having no jurisdiction of criminal cases by writ of error or appeal cannot discharge on habeas corpus, a person imprisoned under the sentence of a circuit or district court in a criminal case, unless the sentence exceeds the jurisdiction of that court or there is no authority to hold him under sentence." (Citing authorities.)

In the case of Miller vs. The People, 183 Illinois, the proposition is affirmatively laid down that an irregularity in the selection o fthe grand jury does not affect the jurisdiction of the court. On page 430 in the opinion the court said:

"A grand jury may be regarded as a part of the machinery to be used in the criminal practice in the courts, but its selection is not a matter affecting the jurisdiction of the court."

The indictment upon which the petitioner was tried and convicted in this case was found at a term of the District Court of Comanche County which was held prior to the occurrence of any general election in said county at which, under the statutory provisions of the Territory, jury lists could have been returned for use by the court, said term of court being held in October, 1901, and the first general election in said county being held in November, 1902. It follows as a necessary result that no jurors could be obtained in Comanche County pursuant to the statutory method until after the general election of 1902, and unless the District Court of Comanche County had the power to issue an open venire for the selection of grand jurors in the mode sanctioned by the common law, it results as a necessary conclusion that a complete barrier was thereby erected to the administration of justice in that county until after the election held nearly a year and a half after the opening of this country to settlement. Upon the proposition of the powers of the District Court of Comanche County to resort to the common law method of obtaining a grand jury I desire to first call attention to that provision of the Organic Act of the Territory of Oklahoma contained in Section 8, thereof which reads as follows:

"And said Supreme and District Courts respectively shall possess chancery as well as common law jurisdiction and authority for redress of all wrongs committed against the Constitution or laws of the United States, or of the Territory, affecting persons or property."

I next direct attention to Section 4200, Volume 2, Wilson's Annotated Statutes of Oklahoma, which reads as follows:

"The common law as modified by constitutional and statutory law, judicial decisions and the conditions and wants of

the people shall remain in force in aid of the general statutes of Oklahoma, etc."

Also to section 5151, same volume which reads as follows:

"The procedure, practice and pleadings in the District Courts of this Territory in criminal actions, or in matters of criminal nature, not specifically provided for in this chapter shall be in accordance with the procedure, practice and pleadings of the common law and assimilated as near as may be with the procedure, practice and pleadings of the United States, or federal side of said court."

The provisions of the Territorial law for obtaining statutory grand and petit juries are contained in Chapter 46, Volume 1, Wilson's Statutes of Oklahoma and I call the attention of this court to the fact that while a complete system is therein provided for the obtaining of grand and petit jurors, and which we will presume was intended by the legislature to be sufficient in all cases, yet there is no provision in said act prohibiting the court from resorting to the common law method in the event that the jury box is exhausted and there is no available method of obtaining qualified jurors. There is a provision in section 3312 of said chapter for summoning sufficient jurors to complete the number required for a jury in a particular case whenever the panel in attendance at the court is exhausted. This applies only to petit juries and to the summoning of talesmen for the particular case. There is no general provision in the Oklahoma statutes providing for the procuring of a statutory grand jury in such an emergency as existed in this case. There is a provision in Section 3313 to the effect that if the list of jurors prepared under the provisions of said act are destroyed or lost that it shall be the duty of the County Clerk to immediately prepare lists as therein provided for and send such lists to each township and city assessor who shall select under oath from the tax payers of his township or city the number of suitable and legal jurors as indicated by the clerk in the notice so sent to

him, and such assessor shall immediately return said list, and the clerk shall again from such lists returned by said assessor prepare the jury list, but it will be observed that this provision presupposes the election of a statutory list of jurors and an emergency where the same have been destroyed or lost, so that there is no existing provision of statutory law for obtaining jurors in the manner indicated under such an emergency as existed in this case. I contend that under these circumstances the District Court of Comanche County, being a court of general original jurisdiction, clothed not only with these powers specially conferred by statute, but with common law jurisdiction by the Organic Law of the Territory bestowed upon it by Act of Congress creating the Territorial Government and having authority for the redress of all wrongs, committed against the constitution or laws of the United States or of the Territory, that as a necessary incident to the exercise of the jurisdiction and powers conferred upon said court it was necessarily clothed with the inherent power to summon for its use those integral elements of the machinery of the court which were necessary for the carrying into effect of the express powers granted to it. It is a fundamental proposition that where there is a general grant of power that by necessary implication there is included in such grants those matters which are incidental and necessary for the carrying into effect of the general powers so delegated. I invite the attention of this court to the case of Clawson vs. United States, 114 U. S. 477 to 488 inclusive, as it will only be possible to quote briefly from said decision in this brief. This was a case in which Clawson was tried and convicted under the laws of the Territory of Utah and by the laws of which Territory a statutory method was prescribed for obtaining grand and petit juries providing that the same should be selected by the Clerk of the District Court and judge of the Probate in the county in which the District Court was to be held to the number of two hundred, which was to constitute a list from which should be selected

grand and petit jurors for the current year. In Clawson's case the statutory methods had been duly observed but the jury box had been exhausted by the drawing therefrom of the entire two hundred names leaving no statutory jury available from which to select the trial jury. Thereupon on the motion of the prosecuting attorney the court issued an open venire to the United States Marshal, commanding him to summon from the body of the judicial district fifty jurors. They were duly summoned and the panel was challenged by the defendant because the jurors were selected and summoned on open venire, and of the jury by which Clawson was tried eleven were obtained from those summoned in the manner indicated. The case went to the Supreme Court of the United States on error, one of the main contentions being that the provisions of the laws of Utah Territory providing a statutory method of selecting juries was exclusive, and that no other method could be pursued, and that if the two hundred names were all drawn out for grand or petit juries at any time during the year, that no more indictments could be found or jury trials had in said court during the remainder of the year. In disposing of this question the Supreme Court of the United States said: (Page 485.)

"A result so disastrous to the administration of justice, so certain to impair if not destroy public and private rights, is not to be permitted, unless imperatively required. The Act of June 23, 1874 does not prescribe the making of a new list by the probate judge and clerk except once a year, in January, or the making by them of an additional list at any time during the year. But that act does not directly or by implication, or intendment exclude the use of an open venire, when the two hundred names are exhausted during the year. It provides that the jurors drawn and summoned shall constitute 'the regular grand and petit juries for the term for all cases.' By other provisions of law each of the District Courts of the Territory is required to hold four terms a year. There is no doubt the jurors must be drawn from the two hundred names or those of them remaining in the box so long as any remain. But the question is, what is to be done when

these names are exhausted? If there is no method that can be resorted to to obtain jurors in such event the provisions in paragraph 5, of the Act of 1882 for challenges of the United States with a view to indictments for the offenses named in that section will have proved suicidal and resulted in destroying all the opportunity to find or try such indictments. We are not referred to any statutory provision in any Act of Congress or any Act of the Territory which forbids the use of an open venire, when the two hundred names are exhausted. The argument is that the provisions of paragraph 5, in the Act 1882 covers the entire subject of obtaining jurors and do not allow of any supplementary measures; and that such measures cannot be resorted to unless affirmative statutory authority directed to the very point is to be found. The Supreme Court of Utah in its opinion affirming the judgment in the present case did not refer to any statute of Congress or of the Territory directly authorizing the open venire but rested the power to issue it on the fact that such power was inherent in the court and was not forbidden by any statute in force in Utah; and held that it followed as an incident to the authority and duty of the District Court to hold its sessions and try by jury, indictments for crimes. We concur in this view so far as the resort to the open venire after the exhaustion of the two hundred names, is concerned.

"Section 4, of the Act of 1874 prescribed the rule to be observed to the extent in which it prescribed any rule. It proceeds on the view that the jury list of two hundred names will be sufficient for ordinary purposes, or, as it expresses it: 'The regular grand and petit juries for the term;' and it provides what shall be done so long as there are no names left in the box. But it is silent as to what shall take place when the name are all exhausted. *It does not forbid the ordinary and well known resort to an open venire.* * * *

"The principle which authorized the action of the court in obtaining petit jurors in this case, after the statutory measures had been exhausted, is sanctioned by authority." (Citing.)

A B. Juris, C; 1st Chitt. Crim. Law. 518.

2 Hale P. C. 265, 266.

U. S. vs. Hill, 1 Brock, 156.
Mackey vs. The People, 2 Colo. 13.
Stone vs. The People, 2 Scammon, 326.
Straughan vs. The State, 16 Ark. 37-43.
Wilburn vs. The State, 21 Ark. 198, 201.
Gibson vs. The Commonwealth, 2 Virg. cases, 111, 121.
Shafer vs. The State, 1 How. (Miss.) 238, 241.
Woodside vs. The State, 2 How. (Miss.) 655, 659.
S[illegible] vs. Harris, (Iowa.)

By paragraph 1868, Revised Statutes, District Courts of the Territory have common law jurisdiction and in paragraph 1874 and 1061 of the Compiled Laws of Utah of 1876 those courts have original jurisdiction in criminal cases, etc. * * * * The venire to summon jurors is a writ necessary to the exercise of the jurisdiction of the court and agreeable to the principles and usages of law, where it is not forbidden or excluded and where the affirmative provisions of law have so far as they extend, been first observed. In U. S. vs. Hill (before cited,) Chief Justice Marshall, speaking of the law as it then existed, says: "It has been justly observed that no act of Congress directs grand juries or defines their power. By what authority, then, are they summond, and whence do they derive their powers? The answer is that the laws of the United States have erected courts which are invested with criminal jurisdiction. This jourisdiction they are bound to observe and it can only be exercised through the instrumentality of grand juries. *They are, therefore, given by a necessary and indispensable implication. But how far is this implication necessary and indispensable? The answer is obvious. Its necessity is co-extensive with that jurisdiction to which it is essential.*"

In my judgment, there is a complete analogy between the Clawson case and the one at bar. What distinction can possibly be drawn between a case where the names of all

the statutory grand jurors have been drawn out of the box and the list exhausted, and no further recourse possible to statutory methods until the commencement of another year, when a new list may be drawn, and a case like this one where the jury box is empty and there are no names of statutory jurors in it, because of the fact that the county was created after the election at which statutory jurors could be returned and the term of court was held in the interim prior to the next general election, which would be the first opportunity to obtain statutory lists of grand jurors? It seems to me that a mere statement of the fact carries with it the answer that there is no distinction. In either instance the statutory method is unavailing. In one case the statutory method has been exhausted, and in the other case, it is impossible to obtain a statutory list for lack of the opportunity and machinery with which to do so. It is in just such an emergency as this that the court has the right to invoke its inherent common law powers and issue an open venire for the purpose of procuring the necessary jurors with which to perform duties expressly vested in the court by law. Upon the argument of this case, in the United States Circuit Court of Appeals, the question was propounded by the court and we were asked to refer to the same in our brief, as to whether the common law jury could be sumoned by a court without legislative authority.

First, in answer to this question I submit that by the citations from the Organic Act and acts of the Territorial Legislature heretofore given that express legislative authority is conferred upon the courts to invoke the common law method of selecting a jury whenever the statutory method has been exhausted or is impossible. Certain it is that the District Courts of the Territory are vested with common law jurisdiction and authority for redress of all wrongs committed against the Constitution or laws of the United States or of the Territory affecting persons or property, and under the law a district court is required to be held in each county in the Territory at such time and place as may be prescribed

by law. Then again the common law as modified by constitutional and statutory law, judicial decisions and the conditions and wants of the people, is to remain in force in aid of the general statutes of Oklahoma. And again by legislative act the procedure, practice and pleadings in the district courts of the Territory in criminal actions or in matters of a criminal nature not specifically provided for in the chapter on criminal procedure, shall be in accordance with the procedure, practice and pleadings of the common law. Now what could be more plain than the intent of the legislature that whenever there should be a failure or omission in the statutory law to meet any of the conditions and wants of the people or any matter not provided for by the code of criminal procedure, that resort should be had to the common law? It is manifest that such a view is one that is conducive to the welfare of the people and the administration of justice, and I think that such is the plain intendment of the various acts cited. In preparing to brief this case, I have examined the authorities relative to the early procedure under the English common law as to the powers of the courts and the methods of obtaining grand juries. At the common law a grand jury consisted of not less than twelve and not more than twenty-three jurors, and a concurrence of at least twelve was necessary in order to return a true bill. In Thompson and Merriam on Juries, Chapter 22, in speaking of the early history of the accusing body it is said, that an accusing body but not a grand jury so called, has certainly been known to the law since the time of Henry III.,How much earlier it existed may be a matter of conjecture. Bracton's account, as stated by Mr. Reaves in his authoritative history of the English law is quite intelligible. A general summons preceded the coming of the justices itinerant into a county, commanding all persons to appear at a certain time and place. After the people had duly assembled, an address was issued to the gathering explaining the cause of their coming and the command of their king that by authority of their allegi-

ance, they should lend their advice and assistance to the repression of crime. Then followed the procedure by which twelve men were selected as an accusing body for each hundred. No witnesses were examined and the presentments were made upon the knowledge of the jurors in respect to any such violations of law as were the subject of their inquiry, etc. This seems to have been the earliest history of an accusing body and which subsequently gave rise to the common law grand jury as we now understand it. The text above stated:

"How long inquests were taken as indicated in the foregoing cannot be definitely stated. The earliest instance of an innovation looking to the establishment of a grand jury taken from the county at large occurs in the forty-second year of Edward III, where at the commission of oyer and terminer, besides the return of an inquest for every hundred by the bailiff, the sheriff likewise returned a panel of knights, which, says the old record, were le graunde inquest. The speculations of Mr. Reaves upon the functions of the inquest after the appearance of this new body are substantially adopted by a later and eminent authority and are given at length, showing the final and complete establishment of the institution of the grand jury. * * * * When the practice began of returning a grand inquest to inquire for the whole body of the county, the business of the hundred inquest must naturally decline, till at length the whole burden of presenting and finding indictments devolved upon the grand inquest and the hundredors continued to be summoned merely for trying issues."

Coming down to the institution of a grand jury as it was finally perfected and known to the common law, the text above stated on page 572:

"At common law the sheriff had the same unqualified power of selection in the case of grand as well as petit jurors. Upon the summons of any session of the peace, and in cases of commissions of oyer and terminer and jail delivery, there issued a precept, either in the name of the king, or of two or more justices, directed to the sheriff, upon which he returned twenty-four or more out of the whole county, a certain num-

ber being for each hundred, from which panel the grand jury was organized, etc."

In Volume 2, Cooley's Blackstone, page 301, paragraph 2, chapter 23, we find the law stated as follows:

"An indictment is a written accusation of one or more persons of a crime or misdemeanor preferred to and presented upon oath by a grand jury. To this end the sheriff of every county is bound to return to every session of the peace, and every commission of oyer and terminer and of general gaol delivery, twenty-four good and lawful men of the county, some out of every hundred, to inquire, present, aid, and execute all those things which on the part of our lord, the king, shall then and there command them. They ought to be freeholders, but to what amount is uncertain, which seems to be casus omissus and as proper to be supplied by the legislature, as the qualifications of the petit jury which were formerly equally vague and uncertain, but are now settled by several acts of parliament. However, they are usually gentlemen of the best figure in the county. As many as appear on this panel are sworn upon the grand jury to the amount of twelve at least and not more than twenty-three, that twelve may be a majority. Which number as well as constitution itself we find exactly described so early as the laws of King Ethelred. In the time of King Richard the Third, the process of electing the grand jury ordained by that Prince was as follows: Four knights were to be taken from the county at large, who chose two more names out of every hundred, which two associated to themselves ten other principal free men, and these twelve were to answer concerning all particulars relating to their own district. This number was probably found too large and inconvenient; but the traces of this institution still remained in that some of the jury must be summoned from every hundred. Thus grand juries are previously instructed in the articles of their inquiry by a charge from the judge who presides upon the bench, etc."

From whatever source the authority of the court to order a grand jury at common law may have been originally derived, it is apparent that the practice as finally adopted was

to issue an open venire to the sheriff who was to select the requisite number from the body of the county and return them into court, out of which panel the grand jury was selected by the court. In this condition the common law came to this country, and has been by express legislation put into force and effect in this Territory except where superseded by statutory enactments, and whatever the original source of power may have been, yet as the common law came to this Territory, it seems to me that the courts were invested by long usage with the inherent power to summon a grand jury in the manner indicated, and if the court had this power, then the District Court of Comanche County properly exercised the power and the grand jury in question was a valid common law grand jury. No question can be raised as to the method of obtaining the grand jury, because the Supreme Court of the United States in the Clawson case has lent its sanction to the method employed where after citing the proceedings had and the decision of the Supreme Court of Utah relative thereto, it was said:

"We concur in this view so far as the resort to the open venire, after the exhaustion of the two hundred names, is concerned."

The query was also propounded in the United States Circuit Court of Apleals at the oral argument, whether in a case like this where a common law indictment was returned, but where before a trial a statutory grand jury had been in session, that circumstances affected the validity of this trial had on the common law indictment.

In reply, will say that I believe that it has no effect whatever. Either the common law indictment was authorized or it was not. If it was authorized the subsequent empanelling of a grand jury would not vitiate it. Even if the common law grand jury was unauthorized, it was still a de facto grand jury, and the judgment of the court is not void and

is consequently invulnerable to collateral attack of habeas corpus.

We do not believe that this court will permit a writ of habeas corpus to be substituted in this case for a writ of error or appeal. We do not believe, in the light of the entire case, that any of the constitutional rights of the petitioner have been invaded in any manner ,and it is hard indeed to believe that any constitutional right of this petitioner could possibly have been overlooked by the able counsel for the petitioner up to and including this time, and do not believe that the various courts through which this case has passed have each been guilty of committing or perpetuating the same error. On the contrary the entire record and all law upon this subject being taken into consideration we think there is one thing and one thing only for this court to do and that is to remand the petitioner to the custody of the respondent in this case with directions to the respondent to confine the petitioner at Lansing, Kansas as he is now confined in accordance with the sentence and judgment originally pronounced upon him in the District Court of Comanche County, Oklahoma Territory.

Respectfully submitted,

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